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Sent: 10/2/2020 4:19:50 PM
To: Parker, Christopher [Parker.Christopher@epa.gov]; Hicks, Matt [Hicks.Matthew@epa.gov]; Morgan, James [Morgan.James@epa.gov]
CC: Laycock, Kelly [Laycock.Kelly@epa.gov]; Hurlid, Kathy [Hurlid.Kathy@epa.gov]
Subject: RE: FL assumption daily check-in
Attachments: RE: just got word that the Governor signed the letter

Flag: Follow up

Hi, all:

I (re)reviewed the sections listed below of Florida's program description. DEP's assertions on compliance/enforcement are in black and my feedback is in blue. Chris, Matt, and JT, please feel free to add to or amend this list and my conclusions based on your experiences at the Regional level and in criminal enforcement.

- (c) Description of the Basic Organization and Structure of [FDEP]...
 - "The current ERP permitting and compliance staff within the district offices, [Mining and Mitigation Program] (MMP), and [Mitigation Banking Program] (MBP) will also be responsible for reviewing State 404 Program permit applications and compliance actions." (p. 5)
 - Districts (6) appear to have dedicated offices under leadership of an "Assistant Director/Compliance Assurance Program" (under which there is a Compliance Manager and multiple Compliance Processors) (p. 7)
 - Districts also appear to have an Administrative Assistant for Compliance (p. 7)
 - The MMP and MBP appear to similarly have multiple Permitting/Compliance Processors (p. 6)
 - The Department appears to have an "Environmental Specialist ERP/404 Compliance Coordination, Program Auditing" (p. 6)

Ex. 5 Deliberative Process (DP)

- (d) Description of the Funding and Person-Power...
 - "The ERP program is staffed with permit processors, compliance processors, and support professionals that are experts in or familiar with the subject matter required for effective review of applications under Section 404 of the Clean Water Act." (p. 2)
 - The MMP will have 14 staff assigned to permit processing and compliance (p. 6)
 - The Central District will have 2 compliance managers and 10 compliance staff (p. 7)
 - The Northeast District will have 2 compliance managers and 7 permitting/compliance staff (p. 8)
 - The Northwest District will have 1 compliance manager and 7 compliance staff (p. 8)
 - The South District will have 6 permitting/compliance managers and 25 permitting/compliance staff (p. 9)
 - The Southeast District will have 2 compliance managers and 5 compliance staff (p. 9)
 - The Southwest District will have 1 compliance manager, 1 permitting/compliance manager and 11 compliance staff (p. 9)

Ex. 5 Deliberative Process (DP)

- (e) An Estimate of the Anticipated Workload...

- “The Department estimates that compliance actions will take 25% of the time calculated for permitting actions.” (p. 21)
- “SLERC [Submerged Lands and Environmental Resources Coordination] subject matter experts will audit a percentage [20% of general permits; 50% of individual permits; 50% of compliance actions] of State 404 Program permit files to ensure that permitting and compliance actions are consistent with the requirements of the State 404 Program.” (p. 22)

Ex. 5 Deliberative Process (DP)

- (g) Description of the State’s Compliance Evaluation and Enforcement Programs

- “SLERC will be responsible for ensuring statewide consistency in implementation of the State 404 Program. SLERC staff will provide rule interpretation, guidance, and training, and will be responsible for reviewing and auditing district-level activities for consistency with overall program enforcement objectives (see section (c) of the program description).” (p. 2)

Ex. 5 Deliberative Process (DP)

- DEP will attempt to resolve certain minor violations through compliance assistance and more significant violations through administrative, civil, or criminal action. (p. 2)

Ex. 5 Deliberative Process (DP)

- DEP will have minimum inspection responsibilities (i.e., a percentage of permittees), subject to adjustments and determinations of risk. (p. 2)

Ex. 5 Deliberative Process (DP)

- If permit violations are identified, the permittee will be advised to immediately stop all activities in violation until compliance is restored. (p. 3)

Ex. 5 Deliberative Process (DP)

- The Department will investigate and provide written responses to all citizen complaints submitted pursuant to State procedures in accordance with 40 C.F.R. §233.41(e)(2)(i). (p. 3)

Ex. 5 Deliberative Process (DP)

- “Field investigation of a potential State 404 Program violation involving an unauthorized regulated activity will include a determination regarding whether the site falls within the jurisdiction of the State’s wetland regulatory programs and whether an unauthorized regulated activity has occurred or is occurring [...] When the inspection confirms that a violation exists, the field investigation will also identify the extent of the violation and the parties responsible.” (p. 4)

Ex. 5 Deliberative Process (DP)

- “When jurisdiction has been established, the investigator will document the condition of the site as necessary to demonstrate whether or not violations of the ERP or State 404 Programs have occurred or are occurring.” (p. 5)

Ex. 5 Deliberative Process (DP)

- Formal enforcement options, laid out by statutory authorities, include administrative and judicial actions; penalties and injunctive relief; and criminal enforcement. (p. 6)

Ex. 5 Deliberative Process (DP)

- “Typical requirements for restoration of a wetland dredge and fill violation may include: fill removal, restoration of pre-violation elevations and contours (which may require submittal of topographic surveys), and replanting; maintenance work including exotic species control; and monitoring and reporting to ensure that the restoration trends toward and achieves success as expected. When necessary, a settlement agreement may require the violator to also provide mitigation needed to offset temporal loss of ecological function [...] An acceptable State 404 Program settlement will generally include complete physical and ecological restoration of the regulated features on the site, or partial

restoration and permit authorization for any unauthorized discharges which will be allowed to remain. The majority of cases will also require the violator to pay a civil penalty.” (pp. 6-7)

※ **Ex. 5 Deliberative Process (DP)**

- “Where unauthorized discharges are allowed to remain in place, the Department should assess penalties which prevent violators from gaining a competitive advantage over entities that do not violate the law and which are sufficient to deter future non-compliance with the State 404 Program permitting procedures.” (p. 7)

※ **Ex. 5 Deliberative Process (DP)**

- A penalty schedule and matrix allow for application of baseline values and subjective factors to adjust a penalty, based on a number of factors. (pp. 8-10).
 - ※ Appears relatively consistent (along with DEP Directive 923) with EPA’s 2001 policy.
- DEP will apply the following factors in its penalty assessment: knowing, deliberate, or chronic violations; good faith efforts to comply (or lack of good faith efforts to comply) either prior to or after discovery of the violation by the Department; history of noncompliance; economic benefit of noncompliance; ability to pay; and other unique factors. (p. 10)

※ **Ex. 5 Deliberative Process (DP)**

- DEP allows for in-king penalties and pollution prevention projects. (p. 11)
 - ※ **Ex. 5 Deliberative Process (DP)**
- DEP will allow for public participation in the enforcement process: investigating and providing written responses to citizen complaints; not opposing intervention when authorized by statute or rule; providing a public comment period for proposed settlements. (p. 11)
 - ※ **Ex. 5 Deliberative Process (DP)**
- Coordination between EPA and DEP on enforcement is set forth in the relevant MOA. (p. 12).
 - ※ **Ex. 5 Deliberative Process (DP)**

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From: Speir, Jeffrey
Sent: Tuesday, September 29, 2020 12:12 PM
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Cc: Parker, Christopher <Parker.Christopher@epa.gov>; Morgan, James <Morgan.James@epa.gov>
Subject: RE: FL assumption daily check-in

Thanks to you both! I will take a look.

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Subject: RE: FL assumption daily check-in

Jeff,

I was asking the group as a whole to try to review sections d (funding and manpower) and e (workload) of the program description. If you guys could take a look at these sections for anything enforcement related in particular that would be great. Also, I don't expect section g (enforcement) has changed since we reviewed in draft but if you get a chance to verify no new issues in that section I would appreciate it. Below is a link to the program description folder.

Ex. 6 Personal Privacy (PP)

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From: Speir, Jeffrey <speir.jeffrey@epa.gov>
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Subject: RE: FL assumption daily check-in

Sorry—could you send the document (or a link to it) that deals with enforcement resources, as discussed on this morning's call?

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-----Original Appointment-----

From: Laycock, Kelly <Laycock.Kelly@epa.gov>
Sent: Thursday, July 09, 2020 8:43 AM
To: Laycock, Kelly; Calli, Rosemary; McGill, Thomas; Hicks, Matt; Hurl, Kathy; Nagrani, Kavita; Wade, Alexis; Parker, Christopher; Ghosh, Mita; Kupchan, Simma; Speir, Jeffrey; Morgan, James; Beck, Whitney
Cc: Creswell, Michael; Clark, Maria; Kajumba, Ntale
Subject: FL assumption daily check-in
When: Tuesday, September 29, 2020 11:30 AM-12:15 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Teams Meeting

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Ex. 6 Personal Privacy (PP)

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